In The
Supreme Court of the United States

October Term, 1961
No. 400

CENTRAL RAILROAD COMPANY
OF PENNSYLVANIA,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO DISMISS APPEAL

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TABLE OF CASES

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MOTION TO DISMISS APPEAL

Appellee moves that the appeal from the final judgment of the Supreme Court of Pennsylvania in the present case be dismissed on the ground that the appeal does not present any substantial Federal questions.

STATEMENT

In the present case, the courts below[1] sustained the imposition of the Pennsylvania Capital Stock Tax against the appellant for 1951.

The appellant is a domestic railroad corporation, incorporated under the laws of Pennsylvania, and domiciled in Pennsylvania. It has no railroad tracks outside Pennsylvania, and thus does none of its railroad business, i.e., transportation by rail for hire, outside Pennsylvania.

The Pennsylvania Capital Stock Tax[2] is a tax upon the property and assets of a domestic corporation[3]. So much of the capital stock of the corporation as is represented by real estate or personal property of a corporeal nature located in another state and used in the operations of the corporation outside Pennsylvania is exempt, but such personal property will be taxable in Pennsylvania as the domiciliary state if it is not permanently located outside the State[4].

The appellant is seeking an exemption from the imposition of capital stock tax for its freight cars tem-

[1] 71 Dauphin County Report 348 (1958); 180 Pa. 403 Pa. 519, 164 A. 2d 878 (1960). Jur. St. Appendix B, pp. 25-33.

[2] §§20 & 21 (a) of the Act of June 1, 1889, P. L. 420, as amended, 72 P.S. §1901, 1871, Jur. St. Appendix A, pp. 23, 24.

[3] *Commonwealth v. Union Shipbuilding Co.*, 271 Pa. 403, 405, 114 A. 257 (1921).

[4] *Commonwealth v. American Dredging Co.*, 122 Pa. 386, 15 A. 443 (1888).

porarily outside Pennsylvania during the tax year while being used by other railroads on their own lines.

The court below held that the appellant's freight cars "which move irregularly and continuously about the country, being used interchangeably by other railroads while serving many shippers before returning to the state of domicile * * * have not attained a tax situs outside Pennsylvania" and therefore were subject to a capital stock tax at full value.[3]

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[3] Jur. St. pp. 32, 33.

QUESTIONS PRESENTED

1. In imposing capital stock tax upon the property of a domestic railroad corporation having no tracks outside Pennsylvania, must the Commonwealth exempt the railroad's freight cars temporarily outside Pennsylvania which, being on lines of other railroads, had not acquired an actual situs in any other state?

2. Has the appellant, by merely showing that a certain number of its unidentified freight cars were temporarily outside Pennsylvania on other railroads in undesignated states, sustained its burden of proving that any such cars had acquired an actual situs in any other specific state, so as to require Pennsylvania to exempt them from capital stock tax?

3. Did the refusal of the taxing departments to grant appellant a property allocation for rolling stock on tracks of other railroads outside Pennsylvania violate equal protection because other railroads having tracks both inside and outside of Pennsylvania had received an allocation for rolling stock, based on track miles in Pennsylvania over track miles everywhere?

SUMMARY OF ARGUMENT

The appellant is seeking a review by this Court of the decision of the Supreme Court of Pennsylvania which held that the appellant's freight cars which were temporarily outside Pennsylvania on lines of other railroads had not acquired a tax situs outside Pennsylvania, and were therefore not exempt from the Pennsylvania Capital Stock Tax imposed on domestic corporations.

The right of the domiciliary state to include in the measure of the tax such meandering freight cars was upheld by this Court in *New York Central R. R. (etc.) v. Miller*[6]. The ruling of that case has never been modified or overruled. Therefore, the present appeal does not present a substantial Federal question of due process or interstate commerce.

Subsequent decisions relied upon by the appellant involving airlines and barge companies do not apply to the instant situation, because in all of those cases the taxpayer was itself operating its own equipment on its own routes outside the taxing jurisdiction and was therefore subject to taxation in such outside states. In the present case, the appellant had no tracks outside Pennsylvania, operated no trains outside Pennsylvania and paid no taxes on its property or franchises to any other state.

Moreover, the appellant, by merely showing that a certain number of its unidentified freight cars were

[6] 202 U.S. 584 (1906).

temporarily outside Pennsylvania on other railroads in undesignated states, did not sustain its burden of proving that any such cars had acquired an actual situs in any other specific state, so as to require Pennsylvania to exempt them from capital stock tax.

Finally, in granting a track mileage exempt ratio for the freight cars of railroads having tracks inside and outside of Pennsylvania, the Commonwealth did not discriminate against appellant, which had no tracks outside Pennsylvania. Thus, this classification, held reasonable by the courts below, does not present a substantial Federal question of equal protection.

ARGUMENT

I. PENNSYLVANIA, THE STATE OF INCORPORATION, MAY TAX ALL OF APPELLANT'S ROLLING STOCK EXCEPT THAT HAVING AN ACTUAL SITUS OUTSIDE PENNSYLVANIA

It is a well-established principle of law that the legislative power of every state applies to all property within its borders. For centuries personal property has been regarded as subject to the law of the owner's domicile, as expressed in the maxim *mobilia sequuntur personam*[7].

The maxim still applies to property temporarily outside the taxing jurisdiction of the domiciliary state, if the property has not acquired an actual or permanent situs elsewhere[8].

In *Southern Pacific Company v. Kentucky*[9], in upholding a state property tax on a fleet of steamships owned by a domestic corporation but permanently employed on the high seas, this Court said:

> "* * * The ancient maxim which assigns to tangibles, as well as intangibles, the situs of the

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[7] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 22 (1891).

[8] 84 C.J.S., *Taxation*, §115, p. 226; 110 A.L.R. 707, 713; L.R.A. 1915 C, p. 908; *Commonwealth v. Universal Trades, Inc.*, 392 Pa. 323, 333; 141 A. 2d 204, 209 (1958); cert. den., 358 U.S. 129, 938.

[9] 222 U.S. 63, 68 (1911).

> owner for purposes of taxation has its foundation in the *protection which the owner receives from the government of his residence.* * * * "

(Emphasis supplied.)

Likewise, in *Greenough v. Tax Assessors*[10], this Court, summarizing this rule, said:

> "* * * And, where the taxable property of a corporation has no taxable situs outside the domiciliary state, that state may tax the tangibles *because the corporation exists under the law of its domicile.*"

(Emphasis supplied.)

An analysis of the decisions of this Court shows a pattern of permitting the state of the corporation's domicile to tax its tangible personal property, unless the taxpayer can shew an actual situs elsewhere for such property.

In *Union Transit Company v. Kentucky*,[11] this Court refused to permit the domiciliary state to tax such property as was definitely located "wholly and exclusively within the jurisdiction of another state".

In *New York Central R. R. (etc.) v. Miller*,[12] after citing the *Union Transit Company* case, this Court agreed that such property could not be taxed if it were permanently outside of the State, but permitted the domiciliary state to tax the rolling stock of the railroad corporation, because it did not appear that any specific cars or any average of cars were so continu-

[10] 331 U.S. 486, 491 (1946).
[11] 199 U.S. 194 (1905).
[12] 202 U.S. 584 (1906).

ously in any other state as to be taxable there; and the absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. This decision was relied upon by the court below in the instant case[13].

The court below had previously followed the permanent location test for tax situs, and also the test of non-taxability elsewhere[14].

In *Northwest Airlines, Inc. v. Minnesota*,[15] this Court explained what it meant by property permanently situated in a state other than the domicile, i.e., "continuously throughout the year, not a fraction thereof, whether days or weeks".

In *Standard Oil Co. v. Peck*,[16] this Court permitted the taxpayer to show that its vessels were continuously outside of the domiciliary state; but this was done to permit taxation on an apportionment basis, in order to avoid multiple taxation of interstate operations. But in the present case, there can be no multiple taxation, because appellant operated no trains outside of Pennsylvania (185a).

The appellant did not pay corporation taxes in any other state (49a). The other states through which the appellant's cars were passing while being operated and used by other railroads, would have had no power

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[13] Jur. St. pp. 29, 32.

[14] *Commonwealth v. American Dredging Co.*, 122 Pa. 386, 15 A. 443 (1888).

[15] 322 U.S. 292 (1944).

[16] 342 U.S. 382 (1952).

to impose taxes on the appellant measured by such cars. See *Commonwealth of Kentucky v. Union Pacific R. Co.*,[17] where the court held that Kentucky could not impose a tax on a foreign railroad as to its freight cars which were being operated within the state by a local railroad under a per diem lease agreement like the one used in the present case.

The decisions in *Ott v. Mississippi Valley Barge Line Co.*,[18] *Braniff Airways, Inc. v. Nebraska State Board*,[19] and *Flying Tiger Line, Inc. v. The County of Los Angeles*,[20] did not repudiate the test for apportionment, set forth in the *New York Central* case, i.e., that the rolling stock must be so continuously in another state as to be taxable there. Furthermore, these decisions are distinguishable from the present case and the *New York Central* case because each of the taxpayers in those cases was engaged in carrying on its own business through the use of its own equipment within the non-domiciliary taxing state.

Therefore, the appellant's freight cars were correctly allocated to Pennsylvania for capital stock tax purposes, because (a) appellant is a Pennsylvania corporation and domiciled in Pennsylvania (39a); (b) none of its freight cars had acquired a fixed or taxable situs outside Pennsylvania; and (c) all of appellant's freight cars outside of Pennsylvania were being operated by other railroads on the trains and tracks of such other railroads and for the business of such other railroads.

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[17] 214 Ky. 330, 283 S.W. 119, 122, 123 (1926).

[18] 336 U.S. 169 (1949).

[19] 347 U.S. 590 (1954).

[20] 51 Cal. 2d 314; 333 P. 2d 323 (1958), cert. den., 359 U.S. 1001.

II. APPELLANT HAS NOT SHOWN THAT ANY OF ITS ROLLING STOCK ACQUIRED A SITUS IN ANY STATE OUTSIDE PENNSYLVANIA

The evidence does not sustain the appellant's burden of proving that any of its freight cars temporarily outside Pennsylvania on the lines of other railroads had acquired an actual situs in any other specific state during 1951.

Appellant apparently proceeded on the premise that all it had to prove at the trial was that certain unidentified rolling stock was absent from Pennsylvania during a portion of the year. Assuming that the evidence showed this (negatived infra), it was not sufficient to establish a fixed situs in a geographical location in a particular state outside Pennsylvania.

The mere presence of the appellant's freight cars in some other unidentified state, wherever it may be, and for however brief a time, would not give that state tax jurisdiction. Tax situs cannot be determined by the number of days spent by an undesignated number of cars on a given railroad whose tracks may pass through one or more such states.

Appellant is a member of the "Association of American Railroads". Under a "Car Service and Per Diem Agreement" (Exhibit "X") entered into by members of the Association, the owning railroad was paid a per diem rate ($1.75) for its freight cars while on the lines of other subscribing railroad mem-

bers and on the lines of non-subscribing railroads. In the latter event, the forwarding subscriber was responsible to the owning subscriber for the per diem rate accruing on the car while on such non-subscribing road. Reports were required from the using subscriber to the owning subscriber (49a, 50a, 143).

In construing Exhibit "X", the Trial Court found as a fact, at the request of the Commonwealth, that when appellant's freight cars were employed on the lines of other railroads, they were under the sole operation and control of such other railroads, and not subject to the control of the appellant (167a).

The appellant has attempted to establish a tax situs for its rolling stock in other *states* by showing the number of car hire days on other *railroads* (Exhibit "Y", 163a, 144a). Obviously, these statistics can bear no relation to the physical location of the cars, especially where the railroads which are operating the cars have tracks in more than one state.

No attempt has been made to trace the path of any specific car during 1951. Appellant bases its claim for an apportionment ratio on the statistics contained in Exhibit "Y" of the Stipulation of Facts, as summarized on statement "Y 6" (144a). But this shows that the allocation of appellant's freight cars was based entirely on theoretical averages, and not on any information regarding the physical location of such cars.

Since Exhibit "Y" relates only to car hire days on *railroads* outside Pennsylvania rather than in *states* outside Pennsylvania, it can have no bearing on tax situs. Similarly, Exhibit AA (146a-157a) can

have no significance, because it is based upon the per diem car hire paid by specific railroads (52a, 53a).

The appellant was doing all of its business in Pennsylvania. Its business was operating a railroad. All of its tracks were in Pennsylvania. When its freight cars were outside Pennsylvania, they were being operated by other railroads on their lines in their railroad business, and not in the railroad business of the appellant.

Exemptions from taxation are strictly construed against the person or corporation claiming such exemption.[21] The appellant has failed to prove that any specific cars had acquired a situs outside of Pennsylvania during 1951, or had even been continuously absent from Pennsylvania during that year.

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[21] §58 (5) of the Pennsylvania Statutory Construction Act, 46 P.S. §558; *Commonwealth v. Sunbeam Water Co.*, 284 Pa. 180, 188, 130 A. 405 (1925); *Hale v. State Board of Assessment and Revision*, 302 U.S. 95, 103 (1937).

III. NO LACK OF EQUAL PROTECTION

The appellant contends that the tax in question violated the equal protection clause of the Fourteenth Amendment, because certain railroad companies having railroad track mileage inside and outside Pennsylvania received a mileage allocation against the rolling stock; whereas the appellant having no track mileage outside Pennsylvania did not receive such a mileage allocation.

A number of railroads which have track mileage inside and outside of Pennsylvania are consolidated railroads, i.e., railroads which have been domesticated in a number of different states.[5] In taxing such railroads domiciled in several states, the principle of *mobilia sequuntur personam* could be applied only on an apportionment basis; and there would be no other way to tax its rolling stock.

Any domestic railroad corporation which had tracks in other states would be entitled to such an allocation, because it was running trains in such other states, i.e., conducting its railroad business there. Thus, the rolling stock apportioned in such other states on a mileage basis would have a business and a tax situs outside of Pennsylvania. This situation

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[5] See *Commonwealth v. Western Maryland Railway Co.*, 377 Pa. 312, 105 A. 2d 330 (1954), cert. den., 348 U.S. 850; *Commonwealth v. N. Y. C. & St. L. R. R. Co.*, 354 Pa. 388, 47 A. 2d 272 (1946), app. dis., 329 U.S. 682; *Fidelity Philadelphia Tax Case*, 354 Pa. 355, 47 A. 2d 267 (1946).

does not apply to the appellant, because none of its cars or locomotives are engaged in its railroad operations when outside of Pennsylvania, but are being used by other railroads in their operations.[23]

Furthermore, the capital stock tax reports filed by railroads having track mileage inside and outside Pennsylvania did not indicate that the rolling stock to which the track mileage ratio was being applied included freight cars for which they received per diem car hire while on the lines of other railroads (55a). In other words, the alleged discrimination, if any, would have been due to the imperfect knowledge of, or lack of notice to, or lack of inquiry by, the taxing officers, and would not constitute a violation of equal protection.[24]

Moreover, the railroads having track mileage inside and outside Pennsylvania paid franchise or property taxes to the other states in which a portion of their railroad track mileage was located (54a, 55a, 251), whereas the appellant was not qualified or authorized to do business in any other state than Pennsylvania, and did not pay franchise or property taxes to states other than Pennsylvania (49a, 12).

Therefore, the court below properly held[25] that the tax settlement did not violate equal protection of the law.

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[23] *See Commonwealth of Kentucky v. Union Pacific R. R. Co.*, supra, Note 16 (283 S.W. 1191).

[24] *Lizzett Co. v. Lee*, 288 U.S. 517, 540 (1933); *Commonwealth v. Koppers Co., Inc.*, 397 Pa. 523, 532, 156 A. 2d 328 (1959), app. dis., 364 U.S. 286 (1960).

[25] Jur. St. p. 33.

For these reasons the Commonwealth's Motion To Dismiss the appeal in the present case for lack of substantial Federal questions should be sustained.

Respectfully submitted,

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